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No. 05-853

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES M. McGOWAN, SR.,

Petitioner,

v.

NJR SERVICE CORPORATION and
NEW JERSEY NATURAL GAS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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The United States does not dispute that the Courts of Appeal are divided on this issue; eight circuits have split 5-3. The dispute has lingered since 1990 when the Sixth Circuit disagreed with the Seventh Circuit. 16 years is more than long enough for a conflict to linger.

The dispute is deeper than a simple head count of circuits. The Seventh Circuit addressed the issue *en banc*, and it split 7 to 4. The Third Circuit split three ways. The passage of time has not helped; no one rationale has come to the forefront.

Only four circuits have not addressed the issue – the District of Columbia, the First Circuit, the Eighth Circuit and the Eleventh Circuit. We do not know the facts of the still to be decided cases which may emanate from any of those circuits or when those cases will be decided. Yet, while the United States would have this Court defer consideration of Jim McGowan's right to designate his wife as his spouse, all twelve courts of appeal will wait and the rights of retiring people will continue to be a function not of statutory construction but of the geographical circuit in which the employees' plans are administered. The issue begs for resolution from this Court.

The United States does not disagree; it suggests that the Court should deny this petition because it does not isolate totally the precise issue. This case is different in that McGowan remarried after he had begun receiving benefits from his NJR pension plan. That difference is not so substantial that it warrants deferral of the issue to another day.

The United States contends that this Court should not exercise its right to construe federal common law on the issue, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), because the statute expressly denies McGowan the right to change beneficiaries after he has begun receiving benefits (Brief at 13 citing 29 U.S.C. § 1055(C)(3)(A), § 1055(c)(8) and regulations promulgated by the Secretary of the Treasury).

The construction of these statutes and regulations either presumes that the participant remains married to his spouse or does not care if the participant remains married. People – even older, retired people – divorce; others become widows and widowers. The statute does not address their rights to designate the new husband or wife as the person entitled to receive benefits for the employee's spouse. The position of the United States is that the new spouse of the retired employee is simply out of luck, that the spousal benefits died along with the deceased or divorced spouse.

ERISA does not address the rights of retired people who divorce, as in this case, or who remarry after the death of a spouse. We have no statistics on the number of people within this category, but the Court may judicially notice that the population is living longer and longer and deeper and deeper into retirement.

There is disagreement among the lower courts and even within the Third Circuit whether a voluntary waiver – as Rosemary Byrne made in connection with her Marital Settlement Agreement – constitutes an alienation of benefits within the ERISA prohibition against alienation of benefits, 29 U.S.C. § 1056(d)(1). A person may waive any provision of a statute intended for his or her benefit provided only that

the waiver contradicts no express statutory provision, *New York v. Hill*, 528 U.S. 110, 116 (2000), *Shutte v. Thompson*, 82 U.S. 151, 159 (1872). Rosemary's waiver was not inconsistent with the statutory purpose of protecting the employee, James, and his spouse, which Rosemary was not.

For the preceding reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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